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No. 98-1165

In the Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE C. BEREANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the criminal prohibition against schemes to defraud victims of "the intangible right of honest services," under 18 U.S.C. 1346, applies to private persons as well as public officials.

2. Whether the government must show a source in state law for a "right to honest services" under Section 1346.

3. Whether a defendant must contemplate harm to the victim to be guilty of mail fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is unpublished, but the judgment is noted at 161 F.3d 3 (Table). The opinions of the district court (Pet. App. 44a-47a, 50a-61a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1998. A petition for rehearing was denied on October 22, 1998. Pet. App. 64a-65a. The petition for a writ of certiorari was filed on January 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of seven counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to five years' probation and fined $20,000. The court of appeals affirmed petitioner's convictions but remanded for resentencing. Pet. App. 1a-43a.

1. Petitioner was an attorney and a registered Maryland lobbyist. From May 1990 to June 1991, he asked employees of his law firm and various family members to write checks for political contributions, which were then distributed to candidates directly or through petitioner's political action committee. The employees and family members received reimbursements through checks from petitioner's law firm. Petitioner billed his lobbying clients for those campaign contributions on a pro rata basis, describing the nominee contribution expenses as "legislative entertainment." Petitioner's retainer agreements did not authorize him to bill his clients for such contributions. Rather, the lobbying clients had agreed to pay petitioner a fixed retainer, as well as "reasonable and necessary expenses" including "legislative entertainment," defined by petitioner as meals and entertainment. Pet. App. 3a-4a.

Petitioner was charged with eight counts of mail fraud under 18 U.S.C. 1341 and 1346. The indictment set out two theories of prosecution. It alleged that petitioner had engaged in a scheme (1) to defraud clients of money and property by submitting bills that included

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[1] One mail fraud count was dismissed pursuant to petitioner's motion for a judgment of acquittal. See Pet. App. 3a n.1.

false statements of expenses incurred, and (2) to defraud clients of their right to petitioner's honest and loyal services. Pet. App. 3a-4a.[2]

2. Before trial, both petitioner and the government sought rulings in limine concerning the admissibility of evidence relating to Maryland election laws. The district court determined that a violation of Maryland election laws was both unnecessary and insufficient to establish mail fraud violations, and the court therefore did not allow petitioner to prove and argue his compliance with those laws. The court, however, permitted the government to introduce into evidence a letter to a client in which petitioner had explained the Maryland election laws as he understood them, as well as the copies of the Maryland election statutes that petitioner had attached to the letter. The district court instructed the jury that the evidence was relevant only to petitioner's motive and intent. Pet. App. 4a-5a, 19a-21a, 46a-47a.

At trial, the clients who had been billed for the campaign contributions testified that they had perceived no fraud either when they paid their bills or at the time of the trial. They also testified, however, that they had not authorized petitioner to make political contributions and had not agreed to pay them. Pet. App. 6a, 11a.

3. The court of appeals affirmed petitioner's convictions in an unpublished decision. Pet. App. 1a-43a.[3]

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[2] The federal mail fraud statute prohibits the use of the mails in furtherance of "any scheme or artifice to defraud." 18 U.S.C. 1341. Section 1346 provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

a. The court of appeals first held that the evidence introduced at trial was sufficient to sustain the mail fraud convictions. Pet. App. 8a-12a. The court stated that the circuits are divided on the question whether the mail fraud statute requires proof that the defendant contemplated the prospect of harm to the victim. *Id.* at 8a-9a. The court concluded, however, that it need not resolve the question because "contemplated harm is present in this case. The contemplated harm is [petitioner's] fraudulent transfer to his clients of his cost of doing business which cost took the form of political contributions." *Id.* at 10a.

Petitioner contended that no contemplated harm was present in this case because the victims of the scheme had testified that they were satisfied with petitioner's services. The court of appeals rejected that claim, holding that the victims' perception was irrelevant to the question whether petitioner had devised a scheme or had acted with the requisite intent to defraud. Pet. App. 10a-11a. The court also observed that "while [petitioner's] clients argue that they were satisfied with [petitioner's] services, they also testified that they did not authorize and would not have knowingly paid for the political contributions [petitioner] made." *Id.* at 11a. Explaining that "[s]ending a false bill to a third party through the mails with the necessary criminal intent is a classic violation of the mail fraud statute," *ibid.*, the court concluded that "the totality of the evi-

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[3] The court of appeals remanded for resentencing, holding that the district court had relied on impermissible reasons in granting a downward departure from the Guidelines sentencing range. Pet. App. 34a-41a. That aspect of the court of appeals' ruling is not at issue in this Court. On remand, petitioner was sentenced to five months' imprisonment, to be followed by a three-year term of supervised release. See 12/4/98 Amended Judgment 2-3.

dence presented is sufficient to support a finding that [petitioner] had a specific intent to defraud, including contemplating harm to his clients," *id.* at 11a-12a.

b. The court of appeals rejected petitioner's claim that 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services," applies only to public officials. The court noted that "[t]he plain language of the statute does not restrict its application to public officials." Pet. App. 13a. The court also explained that Section 1346 was intended to restore the state of the law that had existed before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987). Pet. App. 14a. The court observed that "[i]n addition to the right to honest Government, pre-*McNally* cases held that the intangible rights covered [by 18 U.S.C. 1341] included an employer's or other principal's right to the honest, faithful and disinterested services of its employees or agents." *Id.* at 13a.

The court also held that the indictment described the alleged offenses with adequate particularity. Because the indictment described the fiduciary duty owed by petitioner to his clients, as well as the scheme to bill those clients for expenses they had not authorized, it sufficiently apprised petitioner of the charges against him. Pet. App. 16a-18a. The court also found that, even if the indictment lacked sufficient particularity as to Section 1346, or there was insufficient evidence to uphold a conviction for mail fraud under Section 1346 based on a deprivation of honest services, there was sufficient evidence to sustain a conviction for mail fraud under Section 1341 based on petitioner's scheme to deprive his clients of money or property. *Id.* at 18a.

c. The court of appeals rejected petitioner's argument that evidence of Maryland election laws was improperly admitted at trial. Pet. App. 19a-21a. It noted that a conviction for mail fraud does not require proof of any violation of state law. *Id.* at 19a-20a. The court found, however, that the district court had properly allowed the government to introduce evidence concerning those laws in order to establish petitioner's knowledge and intent. Because "[petitioner's] understanding of the election laws arguably explains his motive and intent for choosing the particular scheme which he utilized," the court explained, the contested evidence was "probative of bad motive or intent as opposed to good faith." *Id.* at 21a.

The court of appeals also held that the prosecutor's references in closing argument to the state election laws "were made within the context of [petitioner] sending the statutes to his clients, allegedly showing what his understanding of the law was." Pet. App. 20a. The court emphasized that statements by the prosecutor implying that petitioner had actually violated the election laws "represented a minor portion of an extensive argument," and that the district court had instructed the jury that Maryland election laws were relevant only to petitioner's motive and intent. *Id.* at 20a; see also *id.* at 21a-26a (rejecting claim of prosecutorial misconduct based on prosecutor's references to state election laws).[4]

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[4] The court of appeals also rejected petitioner's claims that the indictment had been improperly amended (Pet. App. 26a-28a); that the district court had erred in denying petitioner's motion for individualized voir dire (*id.* at 28a-31a); and that the district court had improperly allowed the government to rely in its closing argument on grand jury testimony that had not been introduced into evidence (*id.* at 31a-34a). Petitioner does not press those

ARGUMENT

Petitioner contends that 18 U.S.C. 1346 applies only to public officials; that under Section 1346 the victim's right to honest services must be defined by state law; and that a defendant must contemplate the prospect of harm to the victim in order to violate the mail fraud statute. Those claims lack merit and do not warrant this Court's review.

1. As an initial matter, this case would be an inappropriate vehicle for resolving petitioner's claims regarding the proper application of Section 1346. This case was presented to the jury both on an "honest services" theory and on the theory that petitioner's scheme defrauded his clients of money and property. Petitioner correctly notes (Pet. 23 n.19) that a guilty verdict generally cannot stand when a case is submitted to the jury on alternative theories and one of the theories is invalid as a matter of law. See *Griffin* v. *United States*, 502 U.S. 46 (1991); *Yates* v. *United States*, 354 U.S. 298, 312 (1957). Reversal is not required, however, when the jury's verdict necessarily encompasses findings as to all elements of the offense under the valid theory of prosecution. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 365-367 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); *United States* v. *Webster*, 639 F.2d 174, 181 (4th Cir.), cert. denied, 454 U.S. 857 (1981); *United States* v. *Dixon*, 536 F.2d 1388, 1402 (2d Cir. 1976). Compare *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (instructional error is harmless when the findings on which the jury's verdict necessar-

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claims in this Court. Judge Wilson agreed with the majority's disposition of all issues except for the prosecutor's use of the grand jury testimony, but would have reversed petitioner's convictions on that ground. *Id.* at 41a-43a.

ily rests are "functionally equivalent" to a finding of guilt under a proper instruction).

That principle applies here. The gravamen of the "honest services" theory of prosecution in this case was that petitioner had deprived his clients of their right to his honest services by billing them for "entertainment expenses" that he did not incur. Because the jury's verdict necessarily reflected its determination that petitioner fraudulently deprived his clients of money, the court of appeals' affirmance of his convictions would be proper regardless of whether Section 1346 applies to his conduct. See *United States* v. *Lopez*, 100 F.3d 98, 102-104 (9th Cir. 1996), cert. denied, 520 U.S. 1231 (1997); *United States* v. *Pimentel*, 83 F.3d 55, 60 (2d Cir. 1996); *United States* v. *Baker*, 78 F.3d 1241, 1247-1248 (7th Cir. 1996), cert. denied, 520 U.S. 1222 (1997).

2. Petitioner contends (Pet. 14-23) that 18 U.S.C. 1346 applies only to the "services" of public officials or persons with fiduciary duties to the public. This Court recently denied four petitions for certiorari (arising from a single court of appeals decision) presenting the same question. See *Frost* v. *United States*, 119 S. Ct. 40 (1998) (No. 97-1549); *Turner* v. *United States*, 119 S. Ct. 41 (1998) (No. 97-8295); *Potter* v. *United States*, 119 S. Ct. 41 (1998) (No. 97-8305); *Congo* v. *United States*, 119 S. Ct. 41 (1998) (No. 97-8328). There is no reason for a different result here.

a. The text of Section 1346 does not distinguish between public officials and private actors, like petitioner, who owe a duty of loyalty to clients or employers. Section 1346 defines the term "scheme or artifice to defraud," for purposes of the mail fraud statute, to include "a scheme or artifice to deprive another of the intangible right of honest services." As the court of appeals recognized, "[t]he plain language of the statute

does not restrict its application to public officials." Pet. App. 13a.

b. The history of Section 1346 likewise provides no support for petitioner's position. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals had consistently construed the mail and wire fraud statutes to apply to schemes intended to deprive citizens of their right to honest services from public officials. In addition, numerous pre-*McNally* cases held that the intangible rights covered by the statute included the right of a private employer or other principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Dial*, 757 F.2d 163, 168-170 (7th Cir.), cert. denied, 474 U.S. 838 (1985); *United States* v. *Lemire*, 720 F.2d 1327, 1335-1336 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Siegel*, 717 F.2d 9, 14 (2d Cir. 1983); *United States* v. *Bohonus*, 628 F.2d 1167, 1171-1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *McCracken*, 581 F.2d 719, 722-723 (8th Cir. 1978).[5]

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[5] Relying on *United States* v. *Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986), rev'd *sub nom. McNally* v. *United States*, 483 U.S. 350 (1987), petitioner claims (Pet. 18-19 & n.13) that pre-*McNally* case law limited the "intangible rights" doctrine to schemes involving the services of public officials. Although the court in *Gray* suggested that the mail fraud statute, as lower courts had construed it before *McNally*, did not apply to schemes by private fiduciaries to defraud private parties of their right to honest services, the Sixth Circuit, sitting en banc, subsequently rejected that suggestion. See *United States* v. *Runnels*, 877 F.2d 481, 483-484 (6th Cir. 1989) (en banc) ("The trial judge, correctly in our opinion, read *Gray* to have no effect on the doctrine that the intangible rights theory was 'applicable to non-public officials where a fiduciary duty is involved.'"). In *United States* v. *Frost*, 125 F.3d 346, 366 (1997), cert. denied, 119 S. Ct. 40, 41 (1998), the Sixth Circuit reviewed the

In *McNally*, this Court held that the mail fraud statute is "limited in scope to the protection of property rights." 483 U.S. at 360. The Court stated that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Ibid.* The following year, Congress amended the federal fraud statutes to add Section 1346. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The sponsor of the amendment explained that Section 1346 "restores the mail fraud provision to where that provision was before the McNally decision." 134 Cong. Rec. 33,297 (1988) (statement of Rep. Conyers). Because pre-*McNally* case law had applied the mail fraud statute to private-sector deprivations of the right to "honest services," the history of Section 1346 reinforces the conclusion that such deprivations are covered by the statute in its current form.[6]

c. No decision of a court of appeals has held that private-sector frauds fall outside of Section 1346. As petitioner correctly notes (Pet. 3-4, 14), some courts of appeals have expressed concern about "defin[ing] the outer limits of the private sector rights to 'honest

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pre-*McNally* law and concluded that "private individuals * * * may commit mail fraud by breaching a fiduciary duty and thereby depriving the person or entity to which the duty is owed of the intangible right to the honest services of that individual."

[6] Petitioner argues (Pet. 21) that the rule of lenity bars application of Section 1346 to private-sector relationships. The rule of lenity, however, is a maxim of construction that applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (citations, ellipsis, and internal quotation marks omitted). Here, the text of Section 1346 unambiguously encompasses private-sector deprivations of the right to honest services, and the statute's history reinforces that interpretation.

services' that are now protected by § 1346." *United States* v. *Jain*, 93 F.3d 436, 442 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997); see also *Frost*, 125 F.3d at 365; *United States* v. *Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *United States* v. *Sun-Diamond Growers of California*, 138 F.3d 961, 973 (D.C. Cir.), cert. granted on other grounds, 119 S. Ct. 402 (1998). Petitioner, however, cites no decision holding that Section 1346 is limited to schemes involving the services of public officials, and we are aware of none. Thus, contrary to petitioner's suggestion (Pet. 18-19), there is no conflict among the circuits on the question presented.

d. Contrary to petitioner's contention (Pet. 21-23), application of Section 1346 to private-sector relationships in general, and to petitioner's conduct in particular, raises no serious constitutional concerns. Petitioner cannot succeed in his vagueness challenge (Pet. 21) by demonstrating that hypothetical situations may exist in which application of the statute would be ambiguous. Rather, he must show that the statute failed to provide clear warning that his own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * *, so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). Petitioner, who owed a fiduciary duty to his clients, engaged in an intentional scheme to bill them for campaign contributions that they did not authorize. Because a "person of ordinary intelligence," *Buckley* v.

Valeo, 424 U.S. 1, 77 (1976) (per curiam), would know that such conduct deprived the clients of their right to petitioner's honest services, application of Section 1346 did not violate due process.

There is likewise no merit to petitioner's contention that application of Section 1346 to private-sector relationships would "violate core principles of federalism" (Pet. 21) or exceed the authority of Congress (Pet. 22). Because conviction under Section 1346 requires proof that the mails were used in furtherance of the fraudulent scheme, the statute represents a permissible exercise of congressional power under the Postal Clause, U.S. Const. Art. I, § 8, Cl. 7. See *Badders* v. *United States*, 240 U.S. 391, 393 (1916); see also *Parr* v. *United States*, 363 U.S. 370, 389, 390 (1960). Petitioner's own conduct, moreover, involved economic transactions subject to federal regulation under the Commerce Clause.[7]

3. Petitioner contends (Pet. 23-27) that, in a mail fraud prosecution for deprivation of "the intangible right of honest services," 18 U.S.C. 1346, the government "must prove a violation of state law establishing and defining such a 'right.'" Pet. 23. He relies (*ibid.*) on *United States* v. *Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 625 (1998), for the proposition that "services must be owed under state law and that the government must prove in a federal

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[7] There is also no merit in petitioner's suggestion (Pet. 19-20) that Section 1346 should not apply to this case because it involved political campaign contributions that are closely regulated by the States and "suffused with First Amendment concerns." Petitioner was not prosecuted for making political contributions. He was prosecuted for engaging in a scheme to bill clients for campaign contributions that they did not authorize—conduct that is wholly unprotected by the First Amendment.

prosecution that they were in fact not delivered." 116 F.3d at 734. That claim does not warrant review.

Petitioner never advanced any such claim in the courts below. Indeed, in an opinion rejecting one of petitioner's attacks on the indictment, the district court noted that petitioner "acknowledges that '*[s]tate law is irrelevant* to proving the essential elements of mail fraud.'" Pet. App. 56a. Nor did he argue on appeal that a state-law right is a necessary predicate of a Section 1346 violation. Rather, petitioner made a variety of evidentiary arguments about the government's use of Maryland election laws and restrictions placed on his response. See, *e.g.*, Pet. C.A. Br. 23-25, 26-27, 29-31. He also argued that the district court constructively amended the indictment by redacting references to Maryland election laws, *id.* at 28-29. But petitioner did not claim that Maryland election laws were (or should have been) in any way relevant in defining the "right of honest services" that petitioner, a lobbyist, owed to his clients. Nor did he make the argument (which he now advances in this Court) that the government had to prove under Section 1346 that petitioner had an obligation defined by state law to provide honest services to the victims of his fraudulent scheme.[8] Because peti-

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[8] In fact, in seeking reversal based on the government's asserted references to his violations of Maryland election laws, petitioner contended that "[t]hose improper references have nothing to do with the actual charges, i.e., the billing of expenses to clients." Pet. C.A. Br. 31; see also Pet. C.A. Reply Br. 17 (arguing that the government used election laws to prove more than motive and intent, thus committing error); *id.* at 26 (arguing that to establish a "deprivation of honest services under § 1346 * * * the defendant must have breached intentionally his [fiduciary] duty with the specific intent to defraud; that is, with the specific intent to fraudulently cause material harm to his principal"; no mention of

tioner never argued in the court of appeals that the government was required to prove a state-law source of a right to honest services, this case is not an appropriate vehicle for this Court to review any such claim. [9]

Even if it were properly presented here, petitioner's reliance on *United States* v. *Brumley*, *supra*, would be misplaced. The defendant in *Brumley*, an adjudicative officer within a state agency, accepted payments from lawyers who practiced before him and acted for those lawyers in his official capacity. The court of appeals stated that "[u]nder the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state

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any requirement that the right to "services" be defined under state law).

[9] Petitioner cannot overcome his failure to advance in the court of appeals his claim that "state law [must be] the source of the 'right' to the 'services' at issue" (Pet. 24) merely by noting that the court of appeals stated that "[t]his Circuit previously has concluded that a prosecution for mail fraud does not require the Government to establish proof of any violation of an underlying state law or regulation." Pet. App. 19a. While this Court has discretion to consider an issue that was "passed upon" by the court of appeals, even though not pressed by a party, *United States* v. *Williams*, 504 U.S. 36, 41 (1992), there is no reason to permit petitioner to benefit from that rule. Petitioner made no effort to obtain reversal of his conviction on that ground; and the court of appeals simply restated circuit law (on the irrelevance of state law) as an introduction to its discussion (and rejection) of the quite different claims petitioner actually did present. See Pet. App. 19a-21a (rejecting claim that district court erred in admitting evidence of Maryland election laws); *id.* at 21a-26a (rejecting claim of prosecutorial misconduct in purported government argument that petitioner violated state election laws); *id.* at 26a-28a (rejecting claim of constructive amendment of indictment by deleting references to Maryland election law).

law"—*i.e.*, "the official must act or fail to act contrary to the requirements of his job under state law." 116 F.3d at 734. Because the defendant in *Brumley* was a state employee, the court did not have occasion to consider the application of Section 1346 to private-sector defendants. Nor does *Brumley*'s analysis logically apply in the private sector, where parties generally enter into relationships governed by express contracts and background duties and do not occupy positions created by state law.

In any event, a violation of state law is not an element of a mail fraud offense. See, *e.g.*, *United States* v. *Sawyer*, 85 F.3d 713, 726 (1st Cir. 1996); *United States* v. *Bryan*, 58 F.3d 933, 940 (4th Cir. 1995); *United States* v. *Margiotta*, 688 F.2d 108, 123-124 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1362, aff'd, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972).[10] As

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[10] Contrary to petitioner's contention (Pet. 10-11, 26-27), the district court properly excluded evidence intended to show petitioner's compliance with Maryland election laws. Evidence that petitioner complied with Maryland election laws would have provided no defense to the charge that he had fraudulently billed clients for expenses they did not authorize. Evidence concerning petitioner's understanding of the election laws, however, was properly admitted for the limited purpose of proving petitioner's intent. As the court of appeals explained, "[petitioner's] understanding of the election laws arguably explains his motive and intent for choosing the particular scheme which he utilized." Pet. App. 21a.

the court of appeals correctly recognized, "[s]ending a false bill to a third party through the mails with the necessary criminal intent is a classic violation of the mail fraud statute." Pet. App. 11a.

4. Relying on *United States* v. *D'Amato*, 39 F.3d 1249 (2d Cir. 1994), petitioner argues (Pet. 28-30) that the defendant must contemplate the prospect of harm to the victim in order to be guilty of mail fraud. The court in *D'Amato* held that "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution," and that "the deceit must be coupled with a contemplated harm to the victim." *Id.* at 1257 (quoting *United States* v. *Starr*, 816 F.2d 94, 98 (2d Cir. 1987)). Any conflict between *D'Amato* and decisions of other circuits (see Pet. 28 & n.22; Pet. App. 9a-10a & n.5) provides no basis for further review in this case, however, since petitioner could not prevail even under the *D'Amato* standard. As the court of appeals explained, "[t]he contemplated harm is [petitioner's] fraudulent transfer to his clients of his cost of doing business which cost took the form of political contributions." *Id.* at 10a. The court noted that petitioner's clients "testified that they did not authorize and would not have knowingly paid for the political contributions [petitioner] made." *Id.* at 11a. That petitioner's clients may have been happy with the overall quality of his representation, and may have regarded the improper billings as relatively insignificant in comparison to the value of the services rendered (see Pet. 9-10), does not cast doubt on the court of appeals' analysis or negate any element of the charged offense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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